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Nos. 1 AND 2

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Supreme Court of the United States

OCTOBER TERM, 1963

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

MEMORANDUM OF RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA WITH RESPECT TO PETITIONER'S MOTION FOR DISPOSITION OF CASES AS MOOT

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Petitioner states that the two pending consolidated cases which arose in the international extradition proceeding involving Marcos Perez Jimenez are moot and require appropriate disposition by this Court. With that we agree.

We do not agree, however, that the appropriate disposition is for this Court to direct that the judgments of the Courts of Appeals for the Second Circuit and the Fifth Circuit be "vacated" and that the cases be remanded to those Courts with instructions to order all proceedings in the district courts dismissed as moot. All that is required, we submit, is that the pending appeals be dismissed for mootness.

With respect to the disposition of the pending cases, petitioner relies upon the statement of this Court in *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950), where the Court said:

> "... The established practice of the Court in dealing with a *civil case* from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." (Emphasis added)

But that statement was made with respect to a civil case involving a clear *res judicata* probability and wholly unlike the present separate litigations brought in aid of the extradition proceeding.

In the *Munsingwear* case, the United States sued Munsingwear for alleged violation of a price-fixing regulation, seeking, in separate counts: (i) an injunction and (ii) treble damages. By agreement, the treble damage count was held in abeyance pending trial and final determination of the suit for an injunction. Holding that Munsingwear's prices complied with the regulations, the district court dismissed the complaint seeking injunctive relief.

While an appeal from that dismissal was pending the commodity involved was decontrolled, and the Court of

Appeals dismissed the appeal for mootness. The United States acquiesced in the dismissal and made no motion to vacate the judgment. The district court then dismissed the action on the second count for treble damages on the ground that the issues were *res judicata*.

The Supreme Court sustained this dismissal holding: (i) that the parties being the same in both suits, the district court having jurisdiction over both parties and the subject matter, and its judgment in the injunction suit remaining unmodified, the case fell squarely within the rule of *res judicata;* (ii) that the dismissal of the appeal on the ground of mootness in the Court of Appeals did not warrant an exception to the established rule of *res judicata;* and (iii) that the United States having slept upon its rights by failing to move in the Court of Appeals to vacate the judgment below and remand with a direction to dismiss, the dismissal was proper.

But the facts here presented are totally different. They present no question of a possible application of the principle of *res judicata* or of prejudice in any form to the petitioner. Why petitioner which succeeded fully in its extradition objective now seeks to vacate the judgments of the Courts of Appeals, which related to ancillary matters, it is difficult to understand. On August 16, 1963 the warrant of the Secretary of State was executed by delivery of the person of Marcos Perez Jimenez to the authorities of Venezuela, to which he was then taken for trial. That concluded every aspect of the extradition proceedings pending in the courts of this country. As petitioner states (p. 4): "there is no possibility of the extradition proceeding's being reopened for the receipt of additional evidence."

The practice with respect to mootness as stated by the Supreme Court in the *Munsingwear* case was designed to "clear the path for future relitigation of the issues between the parties . . ." (p. 40). Of such relitigation there is here no possibility as petitioner concedes. Nor is there any need to prevent the judgments below from "spawning any legal consequences" (p. 41). Thus all reason for vacating those judgments fails.

Where an appeal is dismissed for mootness, the judgment and the proceedings below should be vacated only if the petitioning party shows possible prejudice, such as clearly would have been present in the treble damage action left pending on the second count in the *Munsingwear* case. But if petitioner can show no possible or probable proceeding which would be unjustly affected by an unreversed or unvacated judgment there is no reason why the judgment should be vacated and it should be allowed to stand. This petitioner has made no such showing and on the undisputed facts cannot possibly suffer any prejudice.

The method of disposition on grounds of mootness is not a mere matter of procedural mechanics. It involves and should involve an exercise of sound discretion based upon the particular facts. As this Court said in *Walling* v. *Reuter Co.*, 321 U. S. 671, 677 (1943):

> "... If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as *justice may require.*" (Emphasis added)

Conclusion

Neither justice nor any discernible reason requires that the judgments below be vacated and that all proceedings in the courts below be dismissed as moot. With respect to these cases we submit that the appropriate disposition is merely to dismiss the pending appeals for mootness.

Dated: New York, N. Y.
September 25, 1963

Respectfully submitted,

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